

First contested application to transfer proceedings from the CAT to the High Court

Sportradar AG and Another v Football DataCo Limited and Others
[2020] CAT 25 (judgment available [here](#)).

Will Perry, Barrister, Monckton Chambers

December 2020

Ronit Kreisberger QC, Alistair Lindsay and Ciar McAndrew are instructed by Sportradar

Kassie Smith QC and Thomas Sebastian are instructed by Football DataCo

In a judgment handed down on 2 December 2020, the President (Roth J) of the Competition Appeal Tribunal ('CAT') refused an application to transfer proceedings from the CAT to the High Court. This is the first time the CAT has been asked to consider a contested application to transfer a competition law claim out of the CAT.

Background to proceedings

The Claimants ('Sportradar') supply sports data and sports betting services to bookmakers, including live football match data. This data is used by bookmakers to offer 'in-play' betting (e.g. bets on who will score the next goal or win the next penalty). Sportradar competes with the Second and Third Defendants ('Genius') in this market.

The Premier League, English Football League and the Scottish Professional Football League (collectively referred to as 'the Three Leagues') seek to monetise the value of live match data (known as 'Live League Match Data' or 'LLMD') collected from club grounds where matches take place. To this end, the Three Leagues have entered into agreements with the First Defendant (Football DataCo or 'FDC'), granting it the right to attend all their matches and to appoint or sub-licence a third party to collect, collate and distribute data from such matches, excluding audio or audio-visual material. FDC is owned by the Premier League and the English Football League in equal shares.

The Three Leagues also require clubs to implement 'Ground Regulations', which set out the terms on which entry to their grounds is permitted. The Ground Regulations restrict anyone visiting the grounds from recording or transmitting live data unless they hold a licence to do so. The Three Leagues encourage and recommend the imposition of similar restrictions as part of the terms and conditions on match tickets ('Ticket Conditions').

In 2019, FDC concluded an agreement with Genius, granting it exclusive rights, for a period of five years starting with the 2019/20 football season, to collect and collate LLMD directly at Three Leagues matches and to supply this data to betting customers ('the FDC-Genius Agreement'). Under the FDC-Genius Agreement, Genius has the exclusive right to appoint 'Secondary Suppliers' and to supply them with its data feed of LLMD on non-exclusive, non-discriminatory terms for onward supply to betting customers. Sportradar and Genius have not concluded a secondary supplier agreement.

The claim and draft counterclaim

Sportradar alleges that the FDC-Genius Agreement violates Article 101 TFEU and the Chapter I Prohibition under the Competition Act 1998 and is therefore unlawful and void. Sportradar also alleges that FDC has abused a dominant position in the market for the supply of LLMD, contrary to Article 102 TFEU and the Chapter II prohibition of the Competition Act. Sportradar further contends that the Ground Regulations and Ticket Conditions are unenforceable to the extent that they give effect to the impugned FDC-Genius Agreement. Sportradar seeks both damages and an injunction, including an injunction to prevent FDC from applying or procuring the application of the restrictions contained in the Ground Regulations and Ticket Conditions (Judgment, §§14-21).

FDC and Genius defend the claim on various bases. Some are pure competition law defences (e.g. that the FDC-Genius Agreement does not have any anti-competitive object or effect). Other arguments are founded on alleged private law rights (e.g. that LLMD is a trade secret under the Trade Secrets (Enforcement etc) Regulations 2018 and/or constitutes confidential information) (Judgment, §23)

The Defendants' pleadings also include draft counterclaims against both Sportradar and individuals whom Sportradar arranged to attend matches and transmit LLMD from the grounds ('the Scouts'). Six Scouts are named as representative Defendants to the proposed counterclaims. These counterclaims are in draft because they concern non-competition law matters which, as is common ground between the parties, the CAT does not have jurisdiction to determine.

As against the Scouts, the draft counterclaims allege that they are bound by the

Ground Regulations and Ticket Conditions and so their entry into club grounds to collect and transmit LLMD constitutes trespass and/or breach of contract, and their activity in collecting and transmitting that data to Sportradar is a breach of the equitable obligation of confidence. As against Sportradar, the Defendants allege that Sportradar is liable as joint tortfeasor for having procured the Scouts' acts of trespass and/or breach of confidence, that Sportradar itself breached the obligation of confidence by supplying LLMD to betting customers, and that Sportradar has engaged in an unlawful means conspiracy (the unlawful means being the trespass, breach of contract, and breach of confidence and/or of rights in a trade secret) (Judgment, §§24-26).

Sportradar's reply, *inter alia*, disputes that LLMD is confidential and/or a trade secret. Sportradar has also produced indicative defences to the draft counterclaims, in which it accepts that it engaged the Scouts to collect and transmit LLMD but contends that the Ground Regulations and Ticket Conditions are unenforceable for violation of competition law (Judgment, §§27-29).

The application

FDC and Genius cannot issue their counterclaims in the CAT because the non-competition law nature of these claims falls outside the scope of the CAT's jurisdiction. They therefore applied for Sportradar's competition claim to be transferred from the CAT to the High Court in accordance with Rule 71 of the CAT Rules. Rule 71 provides:

"Transfer of claims from the Tribunal

The Tribunal may, at any stage of the proceedings, on the request of a party or of its own initiative, and after considering any observations of the parties, direct that all or part of a claim made in proceedings brought under section 47A of the 1998 Act (proceedings before the Tribunal: claims for damages etc.) be transferred to—

(a) the High Court ... in England and Wales...."

The transfer application was resisted by Sportradar, which contended that the competition law claim was severable from the non-competition law issues raised in the draft counterclaims and was most appropriately determined by the specialist CAT.

The judgment

Guiding Principles

The President's judgment contains a helpful section titled 'guiding principles',

which contains a pithy summary at §46 of how the CAT should approach proceedings involving both competition and non-competition issues:

“46. As I have indicated, the proceedings should be viewed as a whole, including therefore any potential counterclaim which the defendant seeks to advance. On that basis, in my judgment, considerations of particular relevance when considering transfer where proceedings involve both competition issues within the jurisdiction of the CAT and non-competition issues which fall outside its jurisdiction are: (a) the relative significance and complexity of the competition issues for the proceedings; (b) whether the competition issues are separable in practical terms from the non-competition issues; and (c) the likely consequences in terms of delay and cost. Whether or not it is sensible in case management terms for the competition issues to be heard before the non-competition issues may also be material, in particular as regards the time for transfer. Altogether, the separate but overlapping jurisdictions of the CAT and the High Court should be made to serve, not to constrain, the sensible case management of the proceedings.”

The President also makes a number of further general observations on the issues of forum and transfer. In particular, the President observed that:

- The advantages of claims being heard in the CAT as a specialist tribunal have been recognised by the courts (in particular, the President relied on Barling J's [judgment](#) in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2015] EWHC 3472 (Ch) (at §§15-17); subsequently approved by the [Court of Appeal](#) in [2018] EWCA Civ 1536 (at §§357-358)) (Judgment, §§35-40).
- The wishes of the parties are a relevant factor, in that if they are in agreement as to a transfer the CAT is likely to be cautious about declining to transfer (or, conversely, about ordering a transfer if all parties oppose one). However, where there is disagreement between the parties, the CAT will consider objectively which is the most appropriate and sensible course to adopt (Judgment, §41).
- “[T]he fact that a claim has been started in the CAT is not in itself a factor that should carry much weight under rule 71” (Judgment, §42). Finding otherwise would incentivise parties to race to commence proceedings, and would disincentivise attempts to settle disputes without recourse to litigation.
- The fact that proceedings raise “difficult issues of private law” is not a good reason to transfer them from the CAT to the High Court. The tribunal hearing a case in the CAT can be chaired by a High Court judge, who may be no different from the judge who would hear the case in the Chancery

Division if it were transferred (Judgment, §43).

- The mere fact that FDC and Genius raised counterclaims which the CAT does not have jurisdiction to determine does not per se militate in favour of transfer: *“there is no presumption that the CAT should exercise its rule 71 power when non-competition issues arise on a counterclaim to ensure that all aspects of a case are heard in the same forum”*. This flows from the statutory scheme for the transfer of claims from the High Court to the CAT (at section 16 of the Competition Act 1998), which expressly envisages that there may be particular competition issues within wider proceedings that can benefit from the advantages of being determined by the specialist competition tribunal (as happened in the Agents Mutual litigation ¹, in which a competition law defence to a breach of contract claim was transferred from the High Court for determination by the CAT) (Judgment, §§44-45).
- It was not the case that competition issues should not remain in (or be transferred to) the CAT unless the *“relatively high”* test for directing a preliminary issue is satisfied (Judgment, §47).

Dismissal of the application

The President refused the application to transfer (Judgment, §67).

In doing so, the President emphasised that the entirety of Sportradar’s claim and the competition aspects of the FDC and Genius defences fell squarely within the CAT’s jurisdiction (Judgment, §51). The point in issue arose from reliance by FDC and Genius on certain private law rights (e.g. arising from the Ground Regulations and Ticket Conditions, IP rights and obligations of confidence) in other aspects of the FDC and Genius defences and in their draft counterclaims.

The CAT concluded that insofar as the Defendants’ private law rights are relied upon in defence of Sportradar’s competition law claim, the CAT could and should determine that defence as a matter of competition law. At §53 of the Judgment, the President explained:

“Whether Sportradar is right or wrong in its contention that if the FDC-Genius Agreement infringes competition law, that has the consequence that such private law rights cannot be enforced to prevent the collection of LLMD is a matter for trial and not for this application. But in my view, resolution of that contention, which FDC and Genius strongly dispute, manifestly depends on questions of competition law.”

Further, since Sportradar’s defence to the draft counterclaims was based on

¹ *Agents’ Mutual Ltd v Gascoigne Halman Ltd and Agents’ Mutual Ltd v Mognie James Ltd*, order of Sir Kenneth Parker (sitting as a deputy judge of the High Court) of 5 July 2016.

this same competition law argument, the President found that (Judgment, §54):

“...resolution of that competition law argument is necessary for determination of the counterclaims. Moreover, logically I consider that its resolution should come before addressing any disputed issues on the scope and content of the private law rights”.

The President also considered that the question of whether Sportradar’s competition law claim would be determinative of the Defendant’s counterclaims was not the central issue when considering transfer (Judgment, §55):

“That is to some extent informative, but in my judgment it is not the central issue. Once it is appreciated that the defences to the counterclaims raise the same competition issue as is raised in the CAT proceedings, and that this is a distinct issue from other issues concerning the existence or scope of private law rights or the correct interpretation of the elements of the tort of unlawful means conspiracy, I consider it is clear that, absent special considerations, the claim which directly raises this issue should remain in the CAT.”

Further, the President held that there were no “special considerations” which required Sportradar’s claim to be transferred from the CAT:

- *Factual overlap*: any factual overlap between the competition and private law parts of proceedings could be addressed by CAT and High Court hearings being heard by the same High Court judge (Judgment, §57).
- *Overlapping issues as to damages and potential set-off*: the Defendants argued that the claim and counterclaims should be heard together, because damages for the claim should be set-off against damages for the counterclaim and the basis for calculating the two sums could potentially be very different. However, the Tribunal made it clear that liability and quantum issues could be split and the latter transferred to the High Court for all damages questions to be heard together; alternatively, any damages award in one forum could be stayed pending determination of damages in the other forum so that mutual set-off could be achieved (Judgment, §58).
- *The claims against the Scouts*: Genius argued that the Scouts named as defendants in the draft counterclaims would be able effectively to re-argue the competition law defence in the High Court proceedings. Genius also argued that the Scouts may wish to seek a representation order under CPR 19.6, and that the CAT rules made no provision for doing so. The President considered it unlikely that the Scouts would seek to resurrect a competition law defence if Sportradar lost on that issue in the CAT. However, he observed that once pleaded, any such competition law

defence raised by the Scouts could be transferred to the CAT to avoid this risk. The President also noted that, if the Defendants obtained CPR rule 19.6 orders, the CAT's findings on the transferred issues would be legally binding on the Scouts (Judgment, §§59-60).

- *The Three Leagues and the member clubs*: it was also argued by Genius that, as Sportradar was alleging the Ground Regulations and Ticket Conditions were anticompetitive and therefore unenforceable, the Three Leagues and/or clubs might want to be joined as parties, and that this would only be possible in High Court proceedings. The President rejected this argument, finding that: (a) this could be achieved under rule 38 of the CAT Rules; (b) there was of yet no indication that the Three Leagues wished to join proceedings; (c) the Three Leagues and (in particular) the clubs were not directly the target of Sportradar's claim; (d) as FDC was owned by two of the Three Leagues, any arguments these Leagues wished to make could be advanced through FDC; and (e) the fact that the CAT Rules do not contain an equivalent to CPR rule 19.6 was immaterial, as the Three Leagues and clubs could not be classified as 'representative defendants' (Judgment, §§61-62).
- *The SCM Proceedings*: finally, Genius sought to rely on the existence of other proceedings it had brought, against a company called SCM in the Intellectual Property list of the Chancery Division, as a factor militating in favour of transfer. The 'SCM Proceedings' involve allegations that SCM is 'scraping' data from databases in which Genius has database rights. SCM defends the allegations, *inter alia*, on the basis that the contractual agreements pursuant to which the databases are created infringe Article 101 and/or the Chapter I prohibition. The President found that whilst there might be some overlap with the SCM proceedings, they were insufficiently connected with the current claims and counterclaims, such that "*any benefit in joint case management of the two actions is likely to be outweighed by significant disadvantages*" (Judgment, §§63-66).

In conclusion, the CAT refused the application to transfer. The President considered that the tribunal having conduct of the CAT proceedings should be chaired by a High Court judge, who would be able to hold a joint CMC with that judge sitting as both a High Court judge and CAT chairman.

Comment

This was the first time the CAT has considered in detail the principles which apply on a contested application to transfer proceedings to the High Court. The President's pragmatic judgment provides a useful guide to how the CAT will approach such applications. The general principles considered in the judgment are also likely to be relied upon where the High Court is asked to transfer

proceedings, or parts of proceedings, which raise both competition and other private law issues from the High Court to the CAT under section 16 of the Enterprise Act 2002.

In addition, this is the first fully reasoned CAT judgment which considers the Court of Appeal's comments in the Sainsbury's judgment on the advantages of claims being heard by the CAT as a specialist tribunal. Though each transfer application will turn on its facts, this judgment is consistent with the overall tenor of Sainsbury's that it is appropriate for the CAT to retain jurisdiction if significant competition law issues are raised.

More generally, it will be interesting to see how the High Court judge with responsibility for the proceedings manages the dynamic of proceedings progressing in two jurisdictions simultaneously.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.